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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JAMES BOWELL, on Habeas Corpus.	B285434 (Los Angeles County Super. Ct. No. BA191442)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. William C. Ryan, Judge. Petition granted.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Assistant Attorney General, Julie A. Malone and Jennifer O. Cano, Deputy Attorneys General for Respondent.

INTRODUCTION

Proposition 57 amended the California Constitution to add Penal Code section 32, providing for a review for parole consideration for inmates convicted of a nonviolent felony offense and sentenced to state prison, after completing the full term for their primary offense. California's Department of Corrections and Rehabilitation (CDCR) was authorized to adopt regulations in furtherance of the provisions of the initiative. Among the regulations promulgated by CDCR included an exclusion of inmates serving indeterminate sentences and an exclusion of inmates convicted of a sex offense requiring registration as a sex offender.

Petitioner James Bowell is serving an indeterminate sentence of 25 years to life as a result of a 2000 conviction for failure to register as a sex offender (former Pen. Code, § 290, subd. (g)(2); now codified as Pen. Code, § 290.018, subd. (b).).[1] He contends that regulations adopted by the CDCR, in furtherance of its obligations under Proposition 57, improperly exclude him from parole consideration pursuant to Proposition 57. We agree. Accordingly, we grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, Bowell was convicted of assault with intent to rape (§ 220), which is a registrable offense pursuant to the Sex Offender Registration Act (§ 290, subd. (c)). Bowell was released on parole in October 1997, and registered as a sex offender in November 1997. In 1998, Bowell violated parole and was

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[1] All further statutory references are to the Penal Code, unless otherwise specified.

returned to state prison. Paroled again in 1999, Bowell fled California. He was arrested in Nevada in April 1999. In September 1999, Bowell was charged with one count of failure to register as a sex offender, and on September 1, 2000, Bowell was convicted after a jury trial. After a bench trial relating to his prior convictions, Bowell was found to have four prior felony convictions for which he served prison terms (§ 667.5, subd. (b)), as well as three prior felony convictions under the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). Bowell was sentenced to a third strike sentence of 25 years to life. We affirmed the judgment on August 27, 2001. (*People v. Bowell* (Aug. 28, 2001, B144266) [nonpub. opn.].) The sentencing range for the offense of failure to register as a sex offender, without consideration of the Three Strikes law, would have been 16 months, two years, or three years. (Former § 290, subd. (g)(2).)

Bowell filed a petition for writ of habeas corpus on October 4, 2017, asserting that he is entitled to parole review pursuant to the terms of the initiative language in Proposition 57, and that emergency regulations promulgated by CDCR improperly excluded him from consideration. We appointed counsel and requested a supplemental petition. Bowell, through his appointed counsel, filed a supplemental petition on December 11, 2017. Informal opposition to the petition was filed by the Attorney General, on behalf of CDCR, on February 22, 2018, and Bowell filed a reply on March 9, 2018. On April 26, 2018, we issued an order to show cause. The Attorney General filed a written return on May 23, 2018, and Bowell filed a traverse on June 20, 2018.

During the briefing process, revisions to the initially-adopted emergency regulations, discussed in more detail below, became final on May 1, 2018. Pursuant to the revised regulations, the Attorney General argued that Bowell was ineligible for review for parole consideration pursuant to Proposition 57 based on the exclusion, in the final regulations, of (a) indeterminately sentenced inmates and (b) sex offenders from eligibility for review for early parole consideration.

On September 7, 2018, our colleagues in Division Five invalidated the CDCR regulation excluding from parole consideration indeterminately sentenced inmates (*In re Edwards* (2018) 26 Cal.App.5th 1181, 1192 (*Edwards*). The Attorney General advised this court in a supplemental letter brief that it did not intend to appeal the decision in *Edwards*, and that CDCR would adopt emergency regulations making indeterminately sentenced nonviolent offenders eligible for parole consideration pursuant to Proposition 57. The revised emergency regulations went into effect on January 1, 2019, and provide for review for inmates serving indeterminate terms for nonviolent felonies, effectively mooting the argument that Bowell is ineligible for parole consideration as a result of his indeterminate sentence. In its supplemental brief addressing the new regulations, however, the Attorney General maintained that Bowell remains ineligible for parole consideration pursuant to Proposition 57 as a result of his status as a sex offender.

After we scheduled oral argument, Division Five issued its decision in *In re Gadlin* (2019) 31 Cal.App.5th 784 (*Gadlin*). We sought supplemental briefing from the parties. Bowell filed a supplemental brief on February 5, 2019, arguing that the reasoning of *Gadlin*, discussed below, should apply to Bowell.

The Attorney General did not address the merits but instead filed a letter brief arguing that because *Gadlin* was not yet final, and CDCR is reviewing the decision to determine whether to seek review, we should not apply *Gadlin* to Bowell.

DISCUSSION

Proposition 57, the Public Safety and Rehabilitation Act of 2016, was approved by the California electorate on November 8, 2016. It added section 32 to article I of the California Constitution, which provides that an inmate convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense. (Cal. Const., art. I, § 32, subd. (a)(1).) CDCR was charged with adopting regulations in furtherance of the provisions of Proposition 57, and the Secretary of CDCR was required to "certify that [the] regulations protect and enhance public safety." (Cal. Const., art. I, § 32, subd. (b).)

CDCR asserts that Bowell is precluded from early parole consideration by one of the implementing regulations adopted by CDCR pursuant to the terms of the initiative. Title 15, section 3491, subdivision (b)(3) excludes from eligibility any inmate "convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code." (Cal. Code Regs., tit. 15, § 3491, subd. (b)(3).) As interpreted by CDCR, this provision would bar any inmate with a prior conviction for an offense that requires registration as a sex offender. Whether CDCR exceeded its authority by applying this regulation to an inmate like Bowell, who is not currently serving a term of incarceration for a sex offense, but has a past conviction

for a sex offense requiring registration for which he was previously paroled, is the issue presented by this petition.

The Attorney General argues that CDCR determined that " '[s]ex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and that protection of the public from reoffending by these offenders is a paramount public interest.' " (Ex. 1, Prop. 57 Regs., Final Statement of Reasons, at p. 20, citing § 290.03, subd. (a)(1).) As a result of this determination, the Attorney General argues that CDCR acted within its authority in adopting regulations that exclude from the Proposition 57 parole review process any sex offender. Bowell argues that the plain meaning of section 3491(b)(3) is that the commitment offense for which the inmate is currently serving time must be a sex offense.

This issue was addressed by our colleagues in Division Five in *Gadlin*: whether a petitioner serving a sentence for a nonviolent felony with a prior conviction of a sex offense requiring registration was ineligible for relief under the CDCR regulations implementing Proposition 57. In *Gadlin*, the defendant was serving a sentence for a nonviolent felony—assault with a deadly weapon—but had a history of convictions requiring registration as a sex offender pursuant to section 290. The court rejected an interpretation of Proposition 57 that would have permitted the regulations to make a defendant ineligible for relief simply because of past convictions requiring registration. The court analyzed CDCR's rulemaking authority in the context of the ballot initiative, giving effect to the intent of the provisions at issue. It then considered the effect of the regulations' exclusion of any inmate who " 'is convicted of a sexual offense that currently requires or will require registration as a sex

offender under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code.' [Citation.]" (*Gadlin*, *supra*, 31 Cal.App.5th at p.788.)

The majority in *Gadlin* did not reach the issue of whether inmates currently serving a sentence for a sex offense may be categorically excluded from early parole consideration, as a matter of public safety, and did not invalidate the regulation. Indeed, in a concurring opinion, Presiding Justice Baker opined that the regulatory provisions excluding inmates currently in custody for a sex offense were within CDCR's authority. (*Gadlin*, *supra*, 31 Cal.App.5th at pp. 790−791, conc. opn. of Baker, J.)

The entire panel, however, concluded that CDCR's application of California Code of Regulations section 3491(b)(3) to exclude an inmate in the circumstances presented here, in which the inmate is not currently serving a sentence for an offense that requires registration as a sex offender pursuant to section 290, "runs afoul of California Constitution, article I, section 32, subdivision (a)(1)." (*Gadlin*, *supra*, 31 Cal.App.5th at p.790, conc. opn. of Baker, J.) The court acknowledged the policy and public safety concerns described by the Attorney General but concluded that those policy concerns "do not trump the plain text of section 32(a)(1)." (*Id.* at p. 789.) We agree with the majority in *Gadlin* and adopt its reasoning. To hold otherwise would be using Bowell's past conviction requiring registration to disqualify him from relief under Proposition 57 even though his current offense is for a nonviolent felony that is not a registrable sex offense listed in section 290, subdivision (c).

In addition to the plain text of the initiative, in Bowell's case the ballot materials provided to voters further support the conclusion that Proposition 57 does not bar early parole

consideration. "[O]utside a ballot initiative's express provisions," "we examine the materials that were before the voters" to ascertain their intent. (*People v. Valencia* (2017) 3 Cal.5th 347, 364.) The concurring opinion in *Gadlin* points out that proponents of Proposition 57 "assured voters that those required to register as sex offenders would not benefit from the initiative," but distinguishes inmates serving a current sentence for such a crime from those who have previously served a sentence for a registrable sex offense. (*Gadlin*, *supra*, 31 Cal.App.5th at p. 796, conc. opn. of Baker, J.) The arguments against Proposition 57 included, for example, a specific assertion that inmates in custody for "[f]ail[ure] to register as a sex offender" would be eligible for relief pursuant to Proposition 57. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument against Prop. 57, p. 59.) This argument highlights the difference between an inmate currently serving a term for a sex offense and one serving a term for a nonviolent felony that is not a sex offense, but who has an ongoing obligation to register as a sex offender.

As with all other inmates receiving early parole consideration pursuant to Proposition 57 and its implementing regulations, Proposition 57 does not authorize Bowell's release, only early parole consideration, and the "Board of Parole Hearings will be permitted to consider his full criminal history, including his prior sex offense[ ], in deciding whether a grant of parole is warranted. (Pen. Code, § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2449.32, subd. (c).)" (*Gadlin*, *supra*, 31 Cal.App.5th at p. 790, fn. 3, conc. opn. of Baker, J.)

DISPOSITION

The petition for a writ of habeas corpus is granted. The California Department of Corrections and Rehabilitation is directed to conduct a parole consideration review for Bowell within 60 days of issuance of the remittitur.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.